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Supreme Court, U.S.
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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1994

LEGAL ECONOMIC EVALUATIONS, INC.;
IBAR SETTLEMENT COMPANY; and
WEIL INSURANCE AGENCY, INC.
*Petitioners,*
v.
METROPOLITAN LIFE INSURANCE COMPANY, et al.
*Respondents.*

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a private plaintiff which fails to demonstrate injury to itself linked to injury to competition in the relevant market satisfies the antitrust injury burden imposed upon every private enforcement action by Section 4 of the Clayton Act.

2. Whether a federal court erred in adjudicating federal antitrust claims within its exclusive federal jurisdiction in the face of Petitioners' motion to stay the case prompted by Petitioners' desire to await the outcome of their pending state court action.

## THE PARTIES

Respondents do not dispute the description of the parties set forth in the Petition.

## CORPORATE DISCLOSURE STATEMENT (SUPREME COURT RULE 29.1)

Respondent/Defendant The Prudential Insurance Company of America states that there are no parent companies, subsidiaries or affiliates that have issued any shares of stock to the public.

Respondent/Defendant National Structured Settlements Trade Association states that the following members and parent companies are publicly traded:

Aetna Casualty & Surety Co.
Aetna Life Insurance and Annuity Company
(Subsidiaries of Aetna Life & Casualty Co.)

Alexander Hamilton Life Insurance Co. of America
(Subsidiary of Household Group, Inc.)

Allstate Life Insurance Co.
(Subsidiary of Allstate Insurance Co.)

American General Life Insurance Company
(Subsidiary of American General Corporation)

American International Adjustment Co., Inc.
(Subsidiary of American International Group, Inc.)

Berkshire Hathaway Life National Indemnity
(Subsidiary of Berkshire Hathaway, Inc.)

Capital Holding Company

Continental Assurance Co., Inc.
(Subsidiary of Continental Casualty Co., Inc.)

Continental Casualty Co., Inc.
(Subsidiary of SNA Financial Corp.)

CNA Structured Settlement, Inc.
(Subsidiary of CNA Financial Corporation)

Federal Home Life Insurance Co.
(Subsidiary of Harcourt Brace Jovanovich Inc.)

First Colony Life Insurance Co., Inc.
(Subsidiary of Ethyl Corp.)

GE Capital Assignment Corp.
(Subsidiary of General Electric Co.)

Hartford Life Insurance Co.
Hartford Fire Insurance Co.
(Subsidiaries of ITT Corp.)

Integrity National Life Insurance Co.
(Subsidiary of ICH Corp.)

Liberty Life Assurance Corp.
(Subsidiary of Liberty Corp.)

Lincoln National Structured Settlements, Inc.
(Subsidiary of Lincoln National Corp.)

Merrill Lynch Settlement Services
(Subsidiary of Merrill Lynch & Co., Inc.)

PaineWebber, Inc.
(Subsidiary of PaineWebber Group, Inc.)

Providian Capital Management
(Subsidiary of Providian Corporation)

Reliance National Risk Specialists
(Subsidiary of Reliance Insurance Co.)

Ringler Associates Pacific, Incorporated
Ringler Associates Sacramento, Incorporated
Ringler Associates San Francisco, Incorporated
Ringler Associates Bay Area, Incorporated
Ringler Associates Incorporated dba Ringler Associates Incorporated of Delaware

Robert S. Bell
(Neither they, nor any of their parent companies, subsidiaries or affiliates, have issued any shares of stock or other equity interests to the public.)

Safeco Life Insurance Co., Inc.
(Subsidiary of Safeco Corp.)

Smith Barney, Inc.
(Subsidiary of Travelers, Inc.)

Transamerica Life Companies
(Subsidiary of Transamerica Insurance Co.)

Travelers Insurance Company
(Subsidiary of Travelers Corp.)

United of Omaha Life Insurance Company
(Subsidiary of Mutual of Omaha Insurance Company)

Western National Life Insurance Co.
(Subsidiary of Conseco Inc.)

Respondents/Defendants Ringler Insurance Agency; Ringler Associates Pacific, Incorporated; Ringler Associates Sacramento, Incorporated; Ringler Associates San Francisco, Incorporated; Ringler Associates Bay Area, Incorporated; Ringler Associates Incorporated dba Ringler Associates of Delaware; and Robert S. Bell state that neither they, nor any of their parent companies, subsidiaries or affiliates, have issued any shares of stock or other equity interests to the public.

Respondent/Defendant Metropolitan Life Insurance Company states that there are no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates that have issued any shares of stock to the public.

Respondent/Defendant Confederation Life Insurance Company states that all outstanding shares are owned by Confederation Holdings Inc.

Respondent/Defendant Alexander Hamilton Life Insurance Company is a wholly owned insurance subsidiary of Household Group Inc., which is a wholly owned subsidiary of Household Finance Corporation, which is owned by Household International.

Respondent/Defendant The Structured Settlements Company states that there are no parent companies, subsidiaries, or affiliates that have issued any shares of stock to the public.

Respondent/Defendant Safeco Life Insurance Corporation states that it is a wholly owned subsidiary of Safeco Corporation. Safeco National Life Insurance Company and First National Life Insurance Company of New York are wholly owned subsidiaries of Safeco Life. The following are less than wholly owned subsidiaries of Safeco Corporation: C-W Properties, Inc.; Valley Office and Industrial Park, Inc.; Lifeguard Ventures, Inc.; Chemical Dependency Services, Inc.; and Agena, Inc.

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**OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

## JURISDICTION

Respondents do not dispute the description of jurisdiction set forth in the Petition.

## STATUTES INVOLVED

Respondents agree with the recitation of statutes in the Petition.

## STATEMENT OF THE CASE

Summary judgment was granted against Petitioners on their federal antitrust claims due to the absence of proof of antitrust injury, a requisite element imposed in all private enforcement actions by Section 4 of the Clayton Act. In decisions entirely consistent with the antitrust injury principles formulated by this Court over the last two decades, the courts below concluded that the Petitioners' asserted injuries did not flow from injury to competition in the relevant market. In so concluding, the District Court and the Court of Appeals heeded this Court's admonition in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) (*"ARCO"*) that a private plaintiff injured by conduct considered inherently anticompetitive in nature and thus *per se* illegal must nevertheless affirmatively show that its injuries flowed from the demonstrated anticompetitive effect of the violation on the market.

The Petition fails to present an issue worthy of this Court's attention. The decisions below did not involve resolution of important or controversial legal principles not yet addressed by this Court. Indeed, Petitioners do not seriously attempt to argue that there is a conflict between the Circuits requiring this Court's intervention. Rather, the lower courts' rulings reflect the application to the specific factual context at issue — the sale of annuity insurance policies used to facilitate settlement of disputed personal injury tort claims — of settled antitrust injury principles mandated by this Court. In any event, the lower courts' conclusion that Petitioners did not carry their burden to demonstrate that

they sustained antitrust injuries from the asserted boycott is consistent with the results reached in numerous decisions. Consequently, no question warranting review by certiorari is presented by the opinions of the lower courts.

## A. Factual Background

Respondents' summary judgment motion was based upon facts not in dispute or not contested by Respondents solely for the purposes of the motion, including the relevant allegations of the Complaint.

### 1. Annuity Policies

An annuity policy provides specified monthly and occasional lump sum payments for a set number of years, the life of the annuitant, or a combination of the two. (Excerpts of Record[1] II:424.) Life insurance companies (the "Issuers") sell annuities at premiums derived by application of the annuitant's age to the Issuer's premium rate. The rate reflects the Issuer's prediction of its cost to provide the annuity benefits based upon its investment and underwriting policies and the quality of the company. (ER VI:1584.) The Issuer's judgment is especially significant in setting its own premiums for "rated age" annuities.[2]

### 2. Annuity Funded Structured Settlements

A structured settlement occurs when a personal injury plaintiff resolves a claim by accepting a promised stream of specified future periodic payments, often extending for the duration of the plaintiff's life. By accepting a structured

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[1] All citations to Excerpts of Record (hereinafter referred to as "ER") refer to the excerpts submitted in the Ninth Circuit.

[2] A severely ill or injured annuitant may be assigned a rated age unrelated to chronological age, due to a reduced life expectancy. (ER I:40.) The Issuer must predict the extent to which life expectancy should be reduced based upon a medical consultant's evaluation of the annuitant's condition and an underwriter's analysis of survival rate statistics of similarly incapacitated individuals. (ER VI:1583-85.) The greater the age rate-up, the greater the reduction in the price of the annuity.

settlement, as opposed to obtaining a lump sum and then investing it, the plaintiff avoids income tax on the income or interest that the settlement provides. *Internal Revenue Code*, 26 U.S.C. § 104. However, this tax savings is ensured only if the structure is properly handled so that the tort plaintiff is not deemed to have constructively received a lump sum cash settlement. Thus, any annuity funding vehicle must be purchased by the tort defendant or its liability carrier (collectively referred to hereinafter as the "tort defendant").

**3. Role of the Tort Defendant's Broker**

Counsel for the tort defendant may retain a structured settlement expert — a broker licensed to solicit policy applications and provide premium quotes on behalf of some number of Issuers — to facilitate selection of an annuity which will achieve settlement at the least cost to the defendant. Counsel will provide the broker with the necessary information about the prospective annuitant, including the medical evaluation by the tort defendant's medical consultant for use in the Issuer's determination of the rated age and how much the tort defendant is willing to pay in settlement.[3]

The annuity broker then ascertains the annuity benefit streams offered by competing Issuers at the price the tort defendant is willing to pay in settlement by referring to the Issuer's confidential rate schedules disseminated to its appointed brokers, or in age rate-up cases, by eliciting price quotes from various Issuers based upon their respective determinations of rated age. (ER VI:1632-43.) The broker will attend settlement negotiations to explain to the tort plaintiff the precise dollar amount and benefit term of the monthly and occasional lump sum payments. (ER II:399.) Although the Issuer usually is identified in this process, the

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[3]This sum will be a reflection of counsel's assessment of (1) the risk of losing the lawsuit, (2) the extent of the tort plaintiff's damages and (3) the tort defendant's cost of defense.

broker will not disclose to the tort plaintiff the annuity purchase price or assigned age rate-up without the tort defendant's approval. (ER VI:1619.)

Tort defendants regard non-disclosure of the annuity cost as critical to their ability to negotiate a settlement acceptable to their "adversaries," the tort plaintiff, at the least expense. (ER VI:1619.) Petitioners contend and Respondents concede for summary judgment purposes that Respondents agreed not to disclose annuity prices or rate information to tort plaintiffs or their consultants for the purpose and with the effect of reducing the cost to tort defendants of compromising personal injury claims through an annuity funded structured settlement. Respondents' alleged non-disclosure agreement is referred to as the "defense-only policy."

**4. Petitioners' Role as Tort Plaintiffs' Consultants**

Tort plaintiffs may retain a consultant, including Petitioners, to advise concerning the value of a structured settlement offered by the defendant as an alternative to a lump sum cash payment. The consultant can perform a present value estimation of the offer, or can critique a present value estimate provided by the defendant's broker. (ER I:36, 45-46.) Tort plaintiffs pay a fee to the consultants for these services.

At the heart of this case is Petitioners' desire to offer a service to their tort plaintiff client that Petitioners' competitor consultants cannot — to reveal the precise dollar sum to be paid by the tort defendant for a proffered annuity. According to Petitioners, the tort plaintiff can use this information to negotiate a more expensive annuity settlement.

As is undisputed, Petitioners can disclose the precise cost of an annuity offered in settlement only if Petitioners have access to the Issuers' frequently changing annuity rate schedules, and more importantly, are apprised of each Issuer's age rate-up determination in a prospective structured settlement. Petitioners thus sought to procure from the

Issuers and sell to the plaintiff the tort defendant's confidential evaluation of its adversary's injuries, life expectancy and future medical care and expenses, *i.e.* the defendant's opinions concerning the plaintiff's potential damages. (ER I:40.) It is indisputable that this revelation constitutes an involuntary detrimental disclosure of the tort defendant's confidential litigation work product to its adversary, the tort plaintiff.[4]

**B. Proceedings Below**

**1. Petitioners' State Court Action**

Petitioners' initially filed suit in California state court, alleging violations of the state antitrust laws (*California Business and Professions Code* § 16700 et seq.) and other state law claims.[5] The trial court sustained Respondents' demurrer to the antitrust claims, finding that the California Insurance Unfair Practices Act preempts antitrust enforcement actions against life insurance companies. The state Court of Appeal granted Petitioners' appeal and reversed the trial court's ruling on demurrer.[6] Thereafter, the California Supreme Court accepted Respondents' petition for review and the parties presently await oral argument.

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[4]Petitioners advise their tort plaintiff clients to be careful in arguing for too significant an age rate-up, because it necessarily discloses the plaintiff's evaluation of its own reduced life expectancy, which then allows the defendant to argue for a reduction in damages. (ER I:40.) According to one Petitioner,"[a]s long as proper negotiation strategies are employed, counsel can successfully side-step this trap and take seemingly inconsistent positions." *Id.*

[5]Petitioners also asserted claims under the Insurance Unfair Practices Act, (*California Insurance Code* § 790.03 et seq.), the Unruh Act, (*California Civil Code* § 51.5), which prohibits discrimination in business practices, the Unfair Competition Act, (*California Business and Professions Code* § 17200 et seq.) and for tortious interference with business relationships. Appendix to the Petition For Certiorari (the "App."), p. A-36.

[6]The state Court of Appeal held that Petitioners could state claims under the Cartwright Act and the Unfair Competition Act, but not under the Unfair Insurance Practices Act. (App., p. A-35.)

**2. Federal Court Actions**

On September 16, 1991, after the state court antitrust claims had been dismissed, Petitioners filed complaints in the Northern District of California[7], alleging that the defense-only policy violates the Sherman Act (15 U.S.C. § 1 *et seq.*) and asserting state law claims duplicating those pending in the state court action. Respondents filed a motion for summary judgment on the Sherman Act claims on April 10, 1992, contending that Petitioners' allegations, if proven, failed to demonstrate the necessary antitrust injury to Petitioners arising from the defense-only policy. In response, Petitioners moved both ex parte and by noticed motion for a stay of the proceedings in federal court, claiming they would rather litigate in state court first, and alternatively seeking continuance of the court's ruling on the pending summary judgment motion.

The Court denied Petitioners' stay motion, finding that it lacked discretion to delay adjudication of claims within its exclusive federal jurisdiction. However, at the hearing on the motion for summary judgment, the Court granted Petitioners' request for a continuance to conduct additional discovery.

Approximately six months and countless deposition transcript pages later, the District Court ruled that Petitioners failed to show antitrust injury to themselves arising in the market Petitioners asserted was restrained by the defense-only policy — the market for settling tort litigation. (App., p. A-17.) The Court found that the demonstrated effect of the defense-only policy on tort plaintiffs was to deprive them of a negotiating advantage over their litigation adversaries, which is not an injury causally flowing from that aspect or effect of Respondents' conduct and so was not a loss the antitrust laws were designed to prevent. (App., p. A-16.)

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[7]The Complaints filed in each of the three federal court actions are essentially identical in their allegations, and are collectively referred to hereinafter as the "Complaint."

The court reasoned that in any event, assuming Petitioners had demonstrated injury to tort plaintiffs, Petitioners are not tort plaintiffs, and cannot bootstrap tort plaintiffs' injuries to fabricate antitrust injury to themselves. (App., p. A-17.) As the Court found, "the defense only policy merely deprived [Petitioners] of an unfair advantage [they] gained over [their] competition[,]" which is not antitrust injury. (*Id.*) Finally, the court denied Petitioners' claim that antitrust injury exists implicitly in the target of *per se* prohibited conduct based upon the holding in *ARCO*. The court declined to limit application of the holding of *ARCO* to vertical price fixing claims. (App., pp. 17-18.)

Thereafter, Respondents moved for summary judgment on the remaining state law claims. The Court declined to exercise its supplemental jurisdiction and dismissed the state claims without prejudice to avoid issuing a decision on "important" and "novel" questions of the interplay of California state antitrust and insurance regulatory law, which would be "inappropriate where state court proceedings are pending in which the state court could decide the issue in the first instance." (App., pp. A-30, 31.)

**3. The Decision of the Ninth Circuit Court of Appeals**

The Ninth Circuit affirmed the District Court's summary judgment, holding that Petitioners had failed to link their injuries to any demonstrated harm to competition because their alleged "injury does not match either the mischief about which [they] complain[ ] or the markets in which it occurred."[8] (App., p. A-7.) The court found that any injury

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[8] In the Complaint, Petitioners define the following relevant markets: (a) annuities sold to fund structured settlements of personal injury claims and (b) professional consulting services provided to (i) the injury victim and his/her attorney or (ii) the liability carrier regarding the use of annuities to fund structured settlement of personal injury claims.
(ER I:8).

to tort plaintiffs "arises in the market for settling litigation"[9] and the alleged injury to tort defendants from the purchase of over-priced annuities arises in the market for the sale of annuities.[10] Petitioners do not consume or compete in either of these markets and thus their losses do not flow from any demonstrated injury to competition.

The Court of Appeals also affirmed the denial of Petitioners' motion for a stay, stating:

> The District Court followed binding Ninth Circuit precedent which precludes Colorado River abstention where federal jurisdiction is exclusive nothing in that case[ ] suggests that a plaintiff may hedge its bets by filing a federal claim in federal court, placing that claim on hold and taking a shot with an analogous cause of action in state court.

(App., pp. A-10-11.)

### C. Misstatements In the Petition

The Petition contains numerous contradictions and misstatements of fact. In compliance with Supreme Court Rule 15.1, Respondents note the following major misstatements in the petition:

1. Petitioners mischaracterize the tort plaintiff as "legally a 'creditor beneficiary' and — for antitrust purposes — the 'consumer' of" the annuity purchased by the tort defendant to fund a structured settlement. (Petition, p. 3.) Petitioners conceded that the tort plaintiff is merely a revocable payee of the annuity policy, and has no ownership interest in the policy. (ER I:40-41.) The consumer of the annuity — for antitrust and all other relevant purposes — is the tort defendant who buys the annuity from an Issuer.

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[9]The Court noted that tort plaintiffs' alleged injuries "flow[ ] from what makes a structured settlement economically attractive, not from anticompetitive conduct. . . ." (App., p. A-8).

[10]The Court also acknowledged that the antitrust laws do not protect tort defendants from impractical purchasing decisions. (App., p. A-7.)

2. Petitioners attribute the following holding to the District Court:

> as a matter of law [ ] neither petitioners (as competitors in the annuity market) nor tort plaintiffs (as consumers in the annuity market) suffered 'antitrust injury' as a result of respondents' group boycott.

(Petition, p. 8.) This is a misstatement of the District Court's holding, which did not reference the "annuity market" described in the Petition, nor did it describe either tort plaintiffs as consumers of annuities or Petitioners as competitors in the annuity sales market. (App., p. A-17.)

3. Petitioners also misquote the District Court as holding that annuities used in the settlement of litigation cannot be a legally cognizable market subject to the antitrust laws. (Petition, pp. 8-9.) The Court made no such ruling,[11] but instead concluded that tort plaintiffs do not suffer a cogniza-

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[11] In any event, this Court has never held that the antitrust laws apply to the conduct of adversaries in litigating and settling disputed claims, particularly to realign the relative negotiating postures of the litigants. The decisions cited by Petitioners do not apply the antitrust laws "to restraint which subverted the litigation process" as Petitioners contend. In *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990), the Court concluded that a boycott by court-appointed attorneys in the District of Columbia intended to secure higher rates of compensation from the District for their services was a *per se* price fixing conspiracy. The case did not implicate antitrust regulation of the adversarial system, only the traditional business practices of attorneys. *In California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 92 S.Ct. 609, 611-12, 30 L.Ed.2d 642 (1972), the Court extended the immunity from antitrust regulation to concerted activities undertaken through litigation and administrative actions even if it injures other market participants, unless the activities are merely a sham devoid of any merit. The decision did not even suggest application of the antitrust laws to the actual process of litigation or the relationship between litigants. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88, 95 S.Ct. 2004, 2013, 44 L.Ed.2d 572 (1975), a prospective client seeking legal advice alleged a price-fixing conspiracy arising from compliance with a minimum fee schedule for services by members of the local bar association.

ble injury if deprived of a negotiating advantage over their litigation adversaries. (App., pp. A-8, 9.)[12]

4. Petitioners further distort the rulings in the courts below by the asserting that the opinion rested on the holding that Petitioners asserted:

> harm was not cognizable under the antitrust laws because it occurred in the course of settling tort litigation and the supply of goods or services to facilitate court settlements is not "commerce" subject to the antitrust laws.

(Petition, p. 18.) This is yet another mischaracterization of the District Court's determination that tort plaintiffs did not suffer an antitrust injury remedied by the antitrust laws. (App., p. A-16.) More importantly, the characterization runs afoul of the explicit holding of the Court of Appeals:

> to the extent that tort plaintiffs are harmed, that harm arises in the market for settling tort litigation.

5. Petitioners contend that the lower courts erroneously ruled that, as a matter of law, "petitioners did not compete in the market from which Respondents admit Petitioners were excluded." (Petition, p. 16.) To the contrary, the courts held that Petitioners lack antitrust injury in this market because they failed to show an anticompetitive effect to the market as a consequence of Petitioners exclusion as competitors.

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[12] Petitioners complain that the Ninth Circuit declined to reach the lower court's erroneous ruling that annuity funded structured settlements of tort litigation do not constitute a legally cognizable market for antitrust purposes. However, the Ninth Circuit could never "reach" this ruling, because it did not issue from the District Court as described herein. The Ninth Circuit did state:

> Because we concluded that Weil has failed to show that its losses flow from injury to competition in the relevant market, we do not reach Life Carrier and Brokers' alternative theories having to do with aspects of the legal process which they offer in support of the district court's judgment.

(App., p. A-9.)

6. Petitioners argue that the District Court ruling depends upon its erroneous finding that annuity prices are protected as "attorney work product." To the contrary, the District Court's conclusion was premised upon its finding that Petitioners were not injured by anticompetitive acts in any market in which Petitioners participated without regard to whether the cost of a proffered settlement annuity is privileged.[13]

7. Petitioners misstate the lower courts' ruling and their precedential effect by asserting that the courts held that the existence of antitrust injury to consumers in the market as a matter of law precludes antitrust injury to competitors in the same market, the inevitable consequence of which is a complete foreclosure of antitrust relief available to competitors for violations that also injure consumers. (Petition, p. 16.) There is no merit to Petitioners' mischaracterization of the courts' rulings, which in fact were predicated precisely upon a lack of injury to consumers in any market in which Petitioners sustained injury. (App., p. A-7.)

8. Petitioners misstate applicable legal authorities and suggest a non-existent conflict among the circuits in their effort to demonstrate that the lower courts erroneously failed to abstain from adjudication of federal claims within the district court's exclusive federal jurisdiction required by the presence of questions of state policy. (Petition, p. 20.) In any event, the propriety of the court's refusal to abstain is

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[13] With regard to the applicability of the attorney work product doctrine, the Court stated:

> The price quotations given by the life insurance providers to the tort defendants are based on the defendants' evaluation of the tort plaintiff's expected life span, which is often based on the defendants' confidential evaluation of the plaintiff's injuries. This is clearly protected work product.

(App., p. A-16, n.2.) Thus, the court found that revealing the cost of a rated age annuity would necessarily reveal the tort defendants' damage evaluation through a simple reverse engineering process. The Court did not find that annuity prices in a vacuum constituted protected work product.

irrelevant to the substantive legal issue of the lack of antitrust injury dispositive of the federal court claims.

## REASONS FOR DENYING THE WRIT

The Petition offers no reasonable basis for review of the lower courts' decisions. No unresolved question of great legal significance is presented by the decisions below. The lower courts scrupulously adhered to well-settled principles defined by this Court in determining that Petitioners failed to satisfy their antitrust injury burden and the lower courts' findings turned upon the unique facts presented. Contrary to Petitioners' arguments, the courts' holdings will not increase the showing necessary to satisfy antitrust injury by competitors excluded from the market as a result of a group boycott.

Put simply, Petitioners seek review of the decisions below to secure an opportunity to persuade this Court to eliminate antitrust injury as a condition to private enforcement for *per se* antitrust violations. This Court expressly considered and rejected this argument in *ARCO* and there is no reason arising from the decisions below to revisit this issue. There is no conflict among the Circuits in decisions applying antitrust injury and no conflict is presented by the decisions below. Consequently, review of the decisions below affords no opportunity for clarification by this Court of antitrust injury principles.

### I.

### THE SCOPE AND APPLICATION OF THE ANTITRUST INJURY REQUIREMENT IS SETTLED

#### A. This Court's Interpretations Provide An Unambiguous Exhaustive Description Of The Antitrust Injury Requirement Of Section 4 Of The Clayton Act

In an effort to create a reviewable issue, Petitioners mischaracterize the antitrust injury requirement as an "ambiguous doctrine" that has been applied inconsistently by this Court. (Petition, p. 13.) To the contrary, the antitrust injury analysis utilized by the Court of Appeals here reflected the consistently defined principles first enunciated by

this Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). In *Brunswick*, this Court announced that an antitrust plaintiff must establish:

> [I]njury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful ....

*Id.* at 489, 97 S.Ct at 697, 50 L.Ed.2d at 701. This requirement underscores the fundamental tenet that "[t]he antitrust laws ... were enacted for the 'protection of *competition*, not *competitors*.'" *Id.* at 488, 97 S.Ct. at 697, 50 L.Ed.2d at 701, quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962) (emphasis in original).

In *Brunswick*, this Court declined to extend antitrust remedies to injuries for violations which did not injure competition and consumers. The plaintiff sought to recover profits it would have received had its competitors withdrawn from the market which it did not realize due to their continued participation in the market following an illegal merger. Although the merger violated the Clayton Act due to the resulting decrease in the number of competitors in the already highly concentrated market, no anticompetitive effect upon consumers was presumed.

In subsequent decisions, the Supreme Court further defined the showing required to demonstrate antitrust injury. In *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 31, 104 S.Ct. 1551, 1568, 80 L.Ed.2d 2 (1984), the Court extended the reasoning of *Brunswick* to actions pursuing remedies for violations of the Sherman Act. Similarly, in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, 106 S.Ct 1348, 1354, 89 L.Ed.2d 538 (1986), this Court extended the reasoning of *Brunswick* to competitors' suits for price fixing, holding that a competitor may not:

> recover damages for any conspiracy ... to charge higher than competitive prices.... Such conduct would violate the Sherman Act, but it could not injure respon-

dents: as petitioner's competitors, respondents stand to gain from any conspiracy to raise the market price.

The need to demonstrate injuries linked to harm to competition to pursue injunctive relief was confirmed in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986). Thus, as early as 1986, the antitrust injury doctrine had been defined consistently by this Court to limit the availability of private enforcement actions by competitors to those claims seeking losses by a competitor caused by antitrust violations that also cause related injuries to competition.

Any doubt concerning the effect and intent of the antitrust injury principles was resolved in *ARCO*, in which this Court expressly confirmed the need to show antitrust injury in *every* private enforcement action, including those alleging a *per se* violation.[14] This Court also clarified the required showing by explaining that the claimed loss must stem from an anticompetitive effect or aspect of the alleged violation. *ARCO*, 495 U.S. at 334, 110 S.Ct. at 1889, 109 L.Ed.2d at 333. Applying this analysis, the Court found that defendants' *per se* prohibited agreements fixing maximum prices did not cause antitrust injuries to competitors due to the lack of anticompetitive effect on consumers in the market. *Id.* This holding comports precisely with earlier statements by this Court that the antitrust laws were intended to protect competition, not competitors. *See e.g., Brown Shoe*, 370 U.S. at 320, 82 S.Ct. at 1521, 8 L.Ed 2d at 570.[15]

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[14] *See e.g.*, Areeda & Hovenkamp, *Antitrust Law*, Vol. II, ¶ 362, p. 217 (Rev. ed. 1995), "The Supreme Court settled the issue in *ARCO*, which rejected a presumption of antitrust injury in *per se* cases and required the private plaintiff to prove antitrust injury in *every* case" (Emphasis added).

[15] Petitioners have not shown a conflict between the ruling in *ARCO* and the rationales expressed in other decisions of this Court involving claims by competitors for losses due to exclusionary conduct. The decisions referenced by Petitioners (Petition, p. 15) all predate this Court's conclusive discussion of antitrust injury in *ARCO*, and two of the

This Court's decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982) does not conflict with the holding of *ARCO*. In *McCready*, the plaintiff, a consumer of psychotherapy services, alleged injuries flowing from a conspiracy between the defendant health insurance plan and psychiatrists to refuse reimbursement to members for services provided by psychologists. The plaintiff, a consumer in the market in which the anticompetitive effect of the conspiracy occurred, sustained losses consisting of increased cost of psychotherapy services of the boycotted psychologist or a loss of choice of available suppliers for whom reimbursement was provided. These losses were the direct consequence of the conspiracy and flowed from the anticompetitive effect of the boycott.[16]

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three predate the pronouncement of antitrust injury in *Brunswick*. *See e.g. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927). Additionally, the rationale expressed in *Aspen*, the only decision cited that postdates *Brunswick's* demand for antitrust injury in private actions, is entirely consistent with the established principles announced in *ARCO*. In evaluating the plaintiff's claim of an attempt to monopolize the market by its competitor the Court stated:

> The question whether SkiCo's conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.

*Aspen*, 472 U.S. at 605, 105 S.Ct. at 2858-59, 86 L.Ed.2d at 467. Moreover, the *Aspen* decision is not a group boycott action, as Petitioners contend, but an attempted monopolization claim under Section 2 of the Sherman Act.

[16]Petitioners' claim that they have shown antitrust injury to themselves due to a demonstrated anticompetitive effect on tort plaintiffs who are deprived of a negotiating advantage by the defense-only policy is not supported by the decision in *McCready*. First, McCready's injuries occurred in the same market as the harm to psychologists. Petitioners

*McCready* certainly does not stand for the general proposition that competitors affected by an allegedly anticompetitive practice *ipso facto* have sustained antitrust injury.[17]

## B. Lower Court Decisions Have Consistently Interpreted And Applied The Antitrust Injury Requirement

Petitioners assert that lower courts are hampered in their application of the antitrust injury requirements by unsettled questions of its extent and application. They offer in support of their assertion three cases purportedly involving similar

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here failed to demonstrate losses in any market in which competition was injured. As the Ninth Circuit noted:

> Because the *McCready* plaintiff was a *consumer* in the market for psychotherapy services, the ultimate harm from the conspiracy would be borne by her either directly (by having to pay more for those services) or indirectly (by having fewer options). In either event the harm would have been borne in the *same* market (for psychotherapy services).

(App., p. A-9) (emphasis in original). Moreover, Petitioners misstate the holding of *McCready* as allowing a competitor to sue if its injury was "inextricably intertwined" with defendants' violation. However, the referenced quotation in *McCready* speaks not of injury intertwined with the defendants' violation, but rather of the harms sustained by the plaintiff and the boycotted psychologists.

[17] In *O.K. Sand & Gravel v. Martin Marietta Technologies*, 36 F.3d 565 (7th Cir. 1994), the court found competitors do not suffer antitrust injury for lost profits resulting from an antitrust violation which in effect increases prices or restricts output to consumers. In *Stamatakis Industries Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992), the court easily disposed of the claims of a competitor arising from an antitrust violation limited in its anticompetitive effect solely to the injured plaintiff. The court stated that antitrust injury "required every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers' . . . the antitrust laws [ ] protect consumers from suppliers, rather than suppliers from each other." *Id.* The Ninth Circuit recognized the lack of antitrust injury to competitors excluded from the market by prohibited conduct even before the *ARCO* opinion issued. *See e.g., McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812 (9th Cir. 1988) (it is injury to the market or to competition in general, not merely injury to individuals or individual firms that is significant).

claims of losses by competitors excluded from the market with inconsistent results concerning the showing of antitrust injury. However, the reasoning and required showing of antitrust injury in each of these decisions is entirely consistent.[18]

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[18] In *Yellow Pages Cost Consultants, Inc. v GTE Directories Corp.*, 951 F.2d 1158 (9th Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1947, 118 L.Ed.2d 552 (1992), the Ninth Circuit concluded that a competitor sustained antitrust injuries for losses arising from a refusal to deal by its competitor. Yellow Pages sold advice to purchasers of advertising space in GTE's phone book on how to reduce the cost of the ads it purchased from GTE and it also placed ads with GTE on behalf of its customers. GTE withdrew its practice of allowing Yellow Pages to place orders, restricting Yellow Pages' business. The disputed issue before the Court was not application of the antitrust injury principles, but the preliminary determination of the relevant product market. Upon finding that the parties did compete in the market for sales of advertising services, the Court found antitrust injury existed. However, the antitrust injury determination did not arise merely because Yellow Pages was injured as an excluded competitor, but instead because the challenged practice also caused harm to consumers — purchasers of advertising space — in the restrained market. *Id.* at 1162.

Petitioners also misstate the ruling and import of the decision in *Thompson v. Metropolitan Multi-list, Inc.*, 934 F.2d 1566 (11th Cir. 1991), as a suit by a competitor denied access to the market by a boycott of other market participants. To the contrary, the plaintiff in *Thompson* satisfied the antitrust injury requirement precisely because his alleged loss as a consumer flowed directly from the anticompetitive effect of the alleged violation — an increase in the prices of the products he purchased from the defendant.

Finally, the decision in *Indiana Grocery Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419-20 (7th Cir. 1989), which predates the *ARCO* decision, arises from application of the identical principles controlling the decisions in *Yellow Pages* and *Thompson*. The absence of any anticompetitive effect inuring to the market, as opposed merely to the victim of the antitrust violation, mandated the court's conclusion that antitrust injury was lacking.

## II.

## THE DECISION BELOW IS NOT AN UNWARRANTED EXTENSION OF THE ANTITRUST INJURY DOCTRINE

### A. The Courts Below Followed *ARCO's* Dictates In Evaluating Petitioners' Claims Of Antitrust Injury

The lower courts conducted the requisite market examination to determine if Petitioners satisfied the antitrust injury requirement. As instructed by this Court, the courts below carefully scrutinized the anticompetitive effects alleged to discern any causal link to the purported losses to Petitioners. The crux of the lower courts' decisions rested upon their finding that the Petitioners' losses arose in a market distinct from the markets in which anticompetitive effects occurred. The lower courts' requirement is not a departure from the principles established by this Court. As stated in *ARCO*:

> the antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity. Although all antitrust violations, under both the per se rule and rule of reason analysis, 'distort' the market, not every loss stemming from a violation counts as antitrust injury.

496 U.S. at 340 n.8, 110 S.Ct. at 1892 n.8, 109 L.Ed.2d at 333.

As the District Court and the Ninth Circuit correctly noted here, Petitioners have not carried their burden of coming forward with evidence of antitrust injury within any of the markets that Petitioners have defined. Instead, Petitioners have attempted to camouflage their lack of injury by creating a hodgepodge market, an amalgamation of the product markets alleged in the Complaint. Petitioners are not at liberty to craft a market definition at whim, but are limited by economic realities. *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404, 76 S.Ct. 994 1012, 100

L.Ed. 1264 (1956); *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470-71 (9th Cir. 1985).

As the courts below aptly noted, Petitioners' loss — inability to compete in the market for consulting services to tort defendants — does not arise in either the market for settling tort litigation or in the market for the purchase and sale of annuities, the only two markets in which an anticompetitive effect is asserted.[19] Petitioners asserted that the purpose and effect of the defense-only policy, the alleged group boycott, was to withhold annuity price information from tort plaintiffs and Petitioners, who advise tort plaintiffs concerning annuity funded settlements. Petitioners charged that the boycott caused an anticompetitive effect on tort plaintiffs, who could demand settlement annuities providing greater benefits at increased cost to the tort defendants if armed with annuity price information. Petitioners also contended that anticompetitive effect flowed to tort defendants, who purportedly purchased overpriced annuities for use in these settlements.

Petitioners, consultants to tort plaintiffs concerning the value and benefits of a proffered structured settlement, are not injured by Respondents' refusal to disclose the annuity cost to tort plaintiffs. The courts below properly recognized that Petitioners are able to compete unhampered in the market for tort plaintiffs consulting services, and thus have not suffered an injury flowing from a reduction in competition in any market in which they participate.

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[19] Petitioners, which are neither consumers nor competitors in the annuity sale market, unquestionably lack standing to bring an antitrust claim regarding injuries to competition arising there. *See e.g., Exhibitors Service v. American Multi-Cinema*, 788 F.2d 574, 578-79 (9th Cir. 1986) (injured licensing agent lacks standing where neither competitor of defendants nor consumer); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 809 (8th Cir. 1987) (broker of terminated distributor lacked standing against manufacturer in boycott case since distributor was neither consumer nor competitor in relevant market).

**B. The Finding Below That The Direct Victim Of A Group Boycott Did Not Sustain Antitrust Injury Does Not Present A Radical Departure From Settled Legal Principles And Will Not Pose An Insurmountable Obstacle To Future Claims By Competitors**

Petitioners assert that the lower courts' denial of antitrust remedies for their exclusion as competitors caused by an admitted group boycott is inexplicable and a "perversion" of the principles announced in *ARCO*. (Petition, p. 14.) The decisions below are characterized by Petitioners as insurmountable barriers to private remedies due to the purported holdings that as a matter of law a competitor eliminated from a market by exclusionary conduct does not sustain injuries linked to any anticompetitive effect in the market.

Petitioners' depiction of the decisions below is erroneous. The lower courts' holdings merely require competitors to show injury to themselves and competition occurring in the same market. This is the precise standard imposed upon all private plaintiffs under *Brunswick* and *ARCO*.

Indeed, numerous reported decisions have also found that the, intended victim of a group boycott failed to satisfy the antitrust injury requirement. *See e.g. Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1415 (7th Cir. 1989); *Les Shockley Racing Inc. v. Nat'l. Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989); *Balaklaw v. Lovell*, 14 F.3d 793 (2nd Cir. 1994); *Rutman Wine, Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735-36 (9th Cir. 1987); *SCFC ILC v. VISA USA, Inc.*, 36 F.3d 958, 967 (10th Cir. 1994); *Volmar Distribs. v. New York Post Co.*, 825 F.Supp. 1153, 1161 n.5 (S.D.N.Y. 1993).

## III.

## THERE IS NO REASON TO RECONSIDER THE SCOPE OF THE ANTITRUST INJURY DOCTRINE

### A. In *ARCO*, The Court Considered And Rejected Petitioners' Arguments Concerning The Effect Of A Per Se Violation On The Need To Prove Antitrust Injury.

In *ARCO*, this Court mandated the need for proof of antitrust injury in every private enforcement action, even in cases of a horizontal price fixing conspiracy, the "paradigm unreasonable restraint." 495 U.S. at 344, 110 S.Ct. at 1893-94, citing *National Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 100, 104 S.Ct. 2948, 2959, 82 L.Ed.2d 70 (1984). As this Court stated:

> The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The need for this showing is at least as great under the per se rule as under the rule of reason.

*ARCO*, 495 U.S. at 344, 110 S.Ct. at 1893-94, 109 L.Ed.2d at 333.

Despite the unequivocal statement of this Court that proof of a substantive violation is insufficient to show antitrust injury, Petitioners nonetheless assert that the lower courts' adherence to this rule is a basis for review here. They contend that their injuries — elimination as market competitors — is the precise harm to competition that the antitrust laws seek to prevent in prohibiting boycotts and refusals to deal and thus antitrust injury is satisfied. Petitioners extrapolate from the presumption of anticompetitive effect relevant to liability that an excluded competitor necessarily suffers injuries from a reduction in competition. (Petition, p. 12.) Petitioners' circuitous reasoning was considered and dismissed in *ARCO* with the Court's statement that mere proof of a *per se* violation was not a substitute for satisfaction of the antitrust injury requirement. *ARCO*, 495 U.S. at 343, 110 S.Ct. at 1894, 109 L.Ed.2d at 333.

### B. There is Nothing Inherent in Group Boycott Claims that Warrants Broader Private Remedies

Petitioners assert that the antitrust injury analysis of the decisions below is clearly erroneous as demonstrated by the inexplicable finding that Petitioners may not pursue antitrust remedies. Petitioners request in essence that this Court carve out an exception from the antitrust injury requirement to allow competitors injured by a group boycott to pursue antitrust remedies. However, the decisions below present no basis for this Court to redefine the antitrust injury principles for claims involving group boycotts.

In the face of Respondents' demonstration that no injury to competition arises in a market in which Petitioners compete, Petitioners respond with an irrelevant question — if the direct victim of a group boycott does not sustain antitrust injury, who does? (Petition, p. 16.) The *ARCO* decision provides an obvious answer to Petitioners' query as to who sustains antitrust injury. The direct victim of a group boycott does indeed sustain antitrust injury if the restriction on competition flowing from the boycott extends beyond the excluded competitor to cause injury to consumers in the market, through increased prices, decreased output, or other restrictions on the market. Thus, the Court has required the independent showing of antitrust injury to distinguish injuries to competition from injuries to competitors.[20]

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[20]Petitioners' view that they necessarily sustained antitrust injury as victims of a *per se* violation was discredited in *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989). The Seventh Circuit explained:

> It is tempting when performing an antitrust injury analysis to look first at the substantive antitrust provision the defendant has allegedly violated, to note next the harmful effects on competition the substantive provision is designed to prevent, to note further that some of those harmful effects might fall on parties such as the plaintiff, and to conclude, therefore, that the plaintiff should have standing to vindicate the substantive antitrust provision the defendant allegedly has violated .... [This] approach[ ] stand[s] the antitrust injury inquiry on its head.

*Id.* at 1419, n.6.

In any event, the factual circumstances presented in the Petition certainly do not militate in favor of a presumption of antitrust injury if a *per se* group boycott is alleged. In this instance, Petitioners could not construct an antitrust injury out of the admitted allegations of the Complaint, precisely because the harm of which they complain — the inability to sell the tort defendants' negotiating strategy to its ligation adversary — is not a harm of concern to the antitrust laws.

## IV.

## THE DECISION HERE IS FACT-SPECIFIC AND WILL NOT HAVE FAR-REACHING EFFECTS

The decisions below turned on the unique facts of the structured settlement annuity industry, including the peculiar process by which settlements are negotiated between adversaries in tort litigation. The decisions below will not operate to bar all competitor-initiated group boycott suits, as Petitioners contend. Rather, the opinions promote the principles enunciated in *ARCO* and its forbears that the antitrust laws protect competition, not competitors, by limiting the availability of enforcement actions to claims by competitors injured by conduct which restricts competition in the market. Petitioners effectively concede that the rulings of the lower courts were an appropriate application of the mandates announced by this Court in *ARCO*, by their argument in the Petition that *ARCO* itself departed from the settled principles of this Court concerning the availability of private enforcement actions, thereby requiring reconsideration by this Court.

## V.

## THE LOWER COURTS' PROPER DETERMINATION NOT TO STAY OR ABSTAIN FROM EXERCISING EXCLUSIVE FEDERAL JURISDICTION OVER THE FEDERAL SHERMAN ACT CLAIM DOES NOT JUSTIFY GRANT OF CERTIORARI IN THIS CASE

Petitioners' assertion that this Court should grant certiorari because the lower courts improperly refused to stay or abstain from exercising "exclusive" federal jurisdiction over the Sherman Act claims under the "wise judicial administration" doctrine articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), does not justify grant of certiorari. Petitioners' attempt to avoid the consequences of having "forum shopped" among the state and federal courts does not implicate substantial concerns justifying this Court's intervention.

Contrary to Petitioners' characterization, there is no conflict in the Circuits concerning the district court's refusal to stay or abstain proceedings over which it had "exclusive federal jurisdiction." Petitioners' suggestion that the Ninth Circuit's decision in this context is "contrary to many courts in other Circuits" (*see e.g.*, Petition, p. 21) is specious at best. While this Court has not finally resolved the issue of applicability of *Colorado River* abstention to cases involving exclusive federal jurisdiction, the Circuit Courts have uniformly held that a district court has no discretion to stay or abstain where it was exclusive federal jurisdiction. *See Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813 (9th Cir.), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982); *Silberkleit v. Kantrowitz*, 713 F.2d 433 (9th Cir. 1983); *Medema v. Medema Builders, Inc.*, 854 F.2d 210 (7th Cir. 1988); *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980); *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59 (2d Cir. 1986). Moreover, Petitioners' reliance on *Klein v. Walston & Co*, 432 F.2d 936 (2d Cir. 1970) and

*Lorentzen v Levolor Corp.*, 754 F.Supp. 987 (S.D.N.Y. 1990) is particularly dubious because both decisions are contrary to binding precedent in the Second Circuit. *See Levy v. Lewis*, 635 F.2d at 967; *Andrea Theatres, Inc.*, 787 F.2d at 62-63. Similarly, Petitioners' reliance on a single district court opinion and a First Circuit opinion decided prior to this Court's opinions in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983), and *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988) and consideration by the other Circuit Courts is not persuasive.

Petitioners' assertion also disregards this Court's repeated and consistent observation that abstention from the exercise of federal jurisdiction is the exception, not the rule, because of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[21] Petitioners' attempt to invoke U.S. Supreme Court Rule 10.1(c) to have this Court decide whether a district court may stay or abstain proceedings in which it has "exclusive federal jurisdiction" betrays not only a misunderstanding of *Colorado River* abstention requirements, but also disregards the fact that a stay in the federal action in this case would not have affected the determination that Petitioners suffered no "antitrust injury" within the meaning of the federal antitrust law. While ignored by Petitioners, the "wise judicial administration" exception to the exercise of federal jurisdiction is invoked only where both the federal and state courts have concurrent jurisdiction over particular claims. There is no

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[21] *Colorado River*, 424 U.S. at 817, 96 S.Ct. at 1246, 47 L.Ed.2d at 483 (1976); *Moses H. Cone Memorial Hospital*, 460 U.S. at 15-16, 103 S.Ct. at 936, 74 L.Ed.2d at 765; *San Carlos Apache Tribe*, 463 U.S. at 552, 103 S.Ct. at 3206 77 L.Ed.2d at 837; *Gulfstream Aerospace Corp.*, 485 U.S. at 273, 108 S.Ct. at 1135, 99 L.Ed.2d at 296; *McCarthy v. Madigan*, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992).

concurrent jurisdiction over the federal antitrust claims. *See* 15 U.S.C. § 15; *Turf Paradise, Inc.*, 670 F.2d at 821.

As this Court stated in *Moses H. Cone*, a stay or dismissal of the federal action is precluded where there exists a "substantial doubt" as to whether the state proceedings will resolve the federal action. *Moses H. Cone*, 460 U.S. at 28, 103 S.Ct. at 943, 74 L.Ed.2d at 765. Similarly, in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988), the Court reiterated that a stay order is only proper where the district court has "full confidence" that the state action will end the federal litigation. *Id.* at 277, 108 S.Ct. at 1137, 99 L.Ed.2d at 296; *see also San Carlos Apache Tribe*, 463 U.S. at 560, 103 S.Ct. at 3210, 77 L.Ed.2d at 837 (stay improper where state court cannot resolve federal claims).

In this case, as there is no concurrent jurisdiction over the federal antitrust claims, there is no question that the state action *cannot* resolve the federal action. Although Petitioners pursued state law antitrust causes of action in state court, that court has *no* jurisdiction or power to decide the *federal* antitrust claims brought under the Sherman Act. Even had the federal court stayed the Sherman Act claims, Petitioners still would have had to return to federal court where the district court would correctly decide that they suffered no "antitrust injury" as required by federal antitrust law. Under such circumstances, the "efficiency concerns" that lie at the heart of *Colorado River* abstention do not exist here and are directly contrary to Congress' grant of exclusive federal jurisdiction to the federal courts. Additionally, given that the state decision could not be accorded preclusive effect in the federal action, *Colorado River's* concern about avoiding "piecemeal litigation" cannot possibly be furthered by stay or dismissal.

Petitioners' thinly disguised effort to preserve their "forum shopping" does not justify grant of certiorari. Petitioners, not Respondents, decided to file suit in *federal* court seeking adjudication of their *federal* antitrust claims. There-

fore, Petitioners filed suit in federal court upon penalty of having the federal court do precisely what Petitioners sought, *i.e.*, adjudicate their *federal* antitrust claims. Having failed to dismiss the federal claims prior to adjudication and having lost on the merits, Petitioners cannot invoke certiorari under the guise of U.S. Supreme Court Rule 10.1(c) to preserve their right to have the state claims adjudicated first before the federal court considered the exclusively federal antitrust claims. Accordingly, this Court should deny grant of certiorari in this case.

## CONCLUSION

There is no issue presented in the decisions below worthy of review by this Court. The Petition for certiorari should be denied.

Respectfully submitted,

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